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Chap. 10, 75th Congress, 3rd Session 2

In The

Supreme Court of the United States

October Term 1949

No. 293

United States of America,

Petitioner,

v.

Albert J. Rabinowitz,

Respondent.

CROSS PETITION OF ALBERT J. RABINOWITZ FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The defendant, Albert J. Rabinowitz, prays that, if a writ of certiorari issue herein, this Court review the entire judgment of the United States Court of Appeals, including so much of the judgment as remands the first count.

The Question Presented

Whether a person who knowingly sells altered canceled postage stamps, in order to defraud a philatelist, where no fraud is committed intended or attempted upon the government, is guilty of a crime, under Section 268 of Title 18 U. S. C. A. (Now Sec. 473 of new Title 18).

The defendant was convicted, on two counts, of selling and possessing canceled United States postage stamps,

which had been altered for the purpose of defrauding collectors of postage. The alterations were not made so as to destroy or impair the cancellation marks. There is no factual dispute. The government did not contend that the defendant did or attempted anything which would render the stamps usable as postage. The government's proof is admittedly to the contrary and indeed the price at which the cancelled stamps were sold far exceeds the face of the postage.

The first question arising in this case is whether the acts of the defendant constitute a federal crime. The government relies upon the language of Sec. 261 of Title 18 (now Sec. 8 of new Title 18) defining "Obligation or other security of the United States" to include "canceled United States stamps". These words were not in the statute prior to 1938. They were added as part of the general revision of a number of sections of the law designed to permit the illustration of United States canceled and uncanceled stamps, in catalogues and other publications (Chap. 10, 75th Congress, 3rd Session).

Your petitioner submits that there is a serious question involved as to whether the words "canceled United States stamps" should be read literally, so that an alteration of a canceled stamp, as a canceled stamp, where there is no intent to make it usable or practice a fraud on the government is a crime under Sections 265 or 268 of Title 18 (now Sections 473 and 472 of new Title 18).

The Specifications of Errors to be Urged

The Court of Appeals erred in not dismissing the first count, on the ground that: the sale of altered canceled stamps for the purpose of defrauding a collector of canceled

postage, where no fraud was attempted or practiced on the government and the cancellation marks upon the stamps were not altered or obliterated, is not a violation of Sections 265 or 268 of Title 18 (now Sections 473 and 472 of new Title 18).

Herewith petitioner submits a brief upon the questions raised in the solicitor general's petition and in this petition.

It is respectfully submitted that if the government's petition for certiorari is granted the cross petition should be granted so as to bring up all of the questions of law involved.

September 21, 1949.

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Respondent,

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Brief on Behalf of Respondent

With due deference to the majority opinion of the Court of Appeals, it is submitted that were *Harris* v. *U. S.*, 331 U. S. 145 the last utterance of this Court, the search and seizure involved here would not come within either the decision of that case, or the language of the majority opinion.

Admitted facts surrounding the search and seizure in this case are:

(a) Prior to the arrest the government possessed the dies which had been used in making the overprints on the four stamps purchased;

(b) The government had defendants receipted invoice for the sum of $1.72 paid in cash for the four stamps purchased;

(c) The stamps seized (second count, possession) had no relation to the four stamps sold (first count, selling).

(d) The stamps seized were legitimately issued stamps actually canceled by the Post Office. It is not contended that they were stolen or unlawfully obtained. Nothing had been added to or subtracted from the stamps which would render them useful as postage.

The importance of the *Harris* case lies in the exception which it adds, to make admissible evidence seized in the course of a search without a warrant—evidence obtained in the course of a search started in good faith to find the means or instrumentality by which the crime was committed.

This Court in the *Harris* case did not overrule *United States* v. *Lefkowitz*, 285 U. S. 452; *Go Bart Co.* v. *United States*, 282 U. S. 344, nor did it give sanction to receipt of evidence obtained by a general exploratory search.

It is therefore respectfully urged that even in the absence of *Trupiano* v. *United States,* 334 U. S. 669, the evidence obtained as a result of the search in this case would have been inadmissible.

Should this Court decide to review this case it is urged that the Court bring up the entire record, including the refusal of the Court of Appeals to dismiss the first count.

The defendant contended below that the acts charged against him did not constitute a violation of Sections 265 and 268 of Title 18 (now Sections 473 and 472 of new Title 18). These are two of the counterfeiting sections of the criminal code. They are designed to punish those who engage in counterfeiting or dealing in counterfeit "obligations or other securities of the United States". The Court of Appeals held that the inclusion of the words "canceled United States stamps" in the definition of "obligations or other securities of the United States" renders a person liable, for violating the counterfeiting sections, who makes an alteration in a canceled stamp, as a canceled stamp, with no intention of defrauding the government and under circumstances wherein it would not be possible to cheat the government. As in this case wherein the cancellation marks on the canceled stamps were admittedly not obliterated or altered.

The Court of Appeals reached this result by reading Section 261 of Title 18 (now Sec. 8 of new Title 18) literally to encompass any change in a canceled stamp designed to commit a fraud upon any person.

The words "canceled United States stamps" were added to the section in 1938 as part of a general legislative plan to permit the illustration of canceled and uncanceled stamps in magazines and catalogues. The object sought to be attained by Congress was the protection of the integrity of postage as postage and not the protection of the philatelist. The Treasury Department was fearful

that plates designed to reproduce canceled postage might with slight alteration be used to produce stamps simulating unused postage. Section 261 of Title 18 was therefore amended to include the words "canceled United States stamps" so as to permit the government to seize unlicensed plates from which either canceled or uncanceled stamps were printed. This is clearly shown by the letter from Mr. Wayne C. Taylor, acting secretary of the Treasury Department to Vice President Garner, which is quoted in the case of *United States* v. *Pappas,* 134 F. (2nd) 922 (C. C. A. Second Circuit).

It should be noted that Section 348 of Title 18 (now Sec. 501 of new Title 18) still stands, so that one who "forges or counterfeits any postage stamps * * * shall be fined not more than $500 or imprisoned not more than five years or both". The penalty under Sections 265 and 268, under which the defendant was convicted is far greater (up to $5000 and fifteen years under Sec. 265 and up to $5000 and ten years under Sec. 268). If the government's construction of the words "canceled United States stamps" is correct the penalty for making a change in a canceled stamp as a canceled stamp—to defraud a stamp collector—is far greater than the specific penalty for manufacturing an uncanceled stamp to defraud the government under Section 348 (now 501).

The court below relied upon *Foster* v. *U. S.,* 76 Fed. 183 and *Errington* v. *Hudspeth,* 110 Fed. (2) 384, both decided by the Circuit Court of Appeals of the 10th Circuit. Neither case involved canceled postage. The *Foster* case involved a change made in a genuine U. S. five dollar note, the *Errington* case a change made in an uncanceled stamp. The money and the stamp involved in those cases were both obligations of the United States in the true sense. The government had made a commitment still unfulfilled as to each. In the case of the canceled stamp no government commitment remained. There was no obliga-

tion on the part of the government and none was created or simulated by the acts of the defendant or his confederate, leading to the sale.

The literal application of the statute places one who makes an alteration in a canceled stamp, to cheat a collector of canceled stamps, in the category of the counterfeiter of currency. The counterfeiter of currency is one of the most heinous of criminals. As to him the possible punishment provided in the Criminal Code is most severe. The attempt to apply that severe punishment to one who engages in a petty scheme to defraud, punishable under state law, should not lightly be imputed to Congress even though a literal reading of the statute might lead to that result.

Holy Trinity Church v. *United States*, 143 U. S. 457.

CONCLUSION

Should a writ of certiorari issue upon the government's petition, it is requested that the writ bring up for review the entire judgment of the Court of Appeals.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 293

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT J. RABINOWITZ

No. 362

ALBERT J. RABINOWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION AND CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE CROSS PETITION

Supplementing its petition for a writ of certiorari, the Government submits herewith a memorandum opposing the granting of respondent's cross petition for certiorari on the ground that it was filed out of time, and requesting that, in the event the Court grants the Government's

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petition, the writ be limited to the question presented therein *viz,* the legality of the search and seizure.

The relevant facts are as follows:

The respondent and cross petitioner, Albert J. Rabinowitz, was convicted in the District Court for the Southern District of New York on both counts of a two-count indictment. Count 1 (R. 2–3) charged him with knowingly selling four forged and altered obligations of the United States, to wit, postage stamps, with intent that they be passed, published and used as true and genuine, in violation of Section 154 of the Criminal Code (18 U. S. C. [1940 ed.] 268).[1] Count 2 (R. 3–6) charged him with possessing and concealing 573 forged and altered obligations of the United States (also postage stamps), with intent to defraud, in violation of Section 151 of the Criminal Code (18 U. S. C. [1940 ed.] 265).[2]

The evidence adduced at the trial (see Court of Appeals' summary, R. 226) showed that Rabino-

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[1] Section 154 provides in relevant part: "Whoever shall * * * sell * * * any false, forged, counterfeited, or altered obligation or other security of the United States, * * * with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

[2] Section 151 provides in relevant part: "Whoever, with intent to defraud, * * * shall keep in possession or conceal * * * any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned not more than fifteen years."

witz, a seller of postage stamps to collectors, sold to a post office employee four cancelled postage stamps, across the face of which he had caused to be printed what are known as "over-prints." An "over-print" consists of some place name (*e. g.*, "Kans.," "Nebr.," "Guam," "Hawaii," etc. (see R. 43–45)), which at times and for reasons of convenience the Post Office Department prints upon the face of some of an issue of postage stamps; "over-printed" stamps have a scarcity value to collectors. Rabinowitz had taken stamps which had been issued without "over-prints" and subsequently used and canceled, and had employed an engraver to forge "over-prints" over the cancellation marks. The first count was based on the sale of these four stamps.

Subsequently, Rabinowitz' office was searched and 573 additional canceled stamps bearing forged "over-prints," like the four stamps previously sold by Rabinowitz, were discovered and seized. It was the possession of these 573 stamps that the second count alleged as a crime.

On July 28, 1949, the Court of Appeals for the Second Circuit reversed Rabinowitz' conviction on both counts on the sole ground that the 573 stamps involved in the second count had been unlawfully seized by government officers and hence erroneously received in evidence against him (R. 227–229, 231). The judgment of the Court of Appeals was that "the second count

must be dismissed" and that "the first count will be remanded for proceedings in accordance with the foregoing [opinion]" (R. 229, 231). There had never been any issue as to the legality of the manner in which the Government obtained the four stamps involved in the first count, and that count was not ordered dismissed. Presumably, though the record is not clear on the point, the Court of Appeals felt that the error in admitting in evidence the stamps involved in the second count prejudicially affected Rabinowitz as to the first count as well. He is thus entitled, under the Court of Appeals' decision, to a new trial on that count, but to no more.

The Government thereafter filed in this Court a petition for a writ of certiorari, now pending as No. 293, contending that the Court of Appeals erred in holding that the seizure of the 573 stamps involved in count 2 was in violation of the Fourth Amendment. Subsequently, on October 3, 1949, Rabinowitz filed a "cross petition" for a writ of certiorari, now pending as No. 362. This cross petition is devoted in part to a defense of the Court of Appeals' decision holding the search and seizure unlawful (see Cross Pet. 4–5), but primarily it asks that, in the event the Court should grant certiorari, it also review "the refusal of the Court of Appeals to dismiss the first count" (Cross Pet. 5). It is Rabinowitz' contention that, apart from the

question of the validity or invalidity of the search and seizure, *both* counts should have been ordered dismissed because, in the light of the proof developed at the trial, neither count charged an offense. He argues that, since the stamps involved in both counts were canceled stamps, and since there was no evidence of any intent on his part to defraud the United States—the intended victims of his fraud having been stamp-collectors only—he violated neither Section 154 nor Section 151 of the Criminal Code (see footnotes 1 and 2, *supra,* p. 2), on which counts 1 and 2, respectively, were based (Cross Pet. 1–3, 5–7).

1. In so far as the cross petition seeks review of "the refusal of the Court of Appeals to dismiss the first count," it constitutes an attack upon the judgment below and should be denied as untimely. The judgment of the Court of Appeals was entered July 28, 1949 (R. 231). The cross petition was filed October 3, 1949, more than thirty days thereafter. There was no order or request for an order extending Rabinowitz' time for filing such a petition. See Rule 37 (b) (2), F. R. Crim. P.

2. The cross petition, however, presents an argument which, if it were sound, would support the judgment of the Court of Appeals, ordering dismissal of the second count, on a different ground from that relied on by the Court of Appeals, *viz,* the asserted failure of that count (or,

indeed, of either count) to charge an offense because of the facts that the stamps in question were canceled stamps and that the fraud was against stamp-collectors rather than against the United States.[3] The cross petition thus seeks to inject a second question which it asks the Court to consider if the Government's petition for certiorari is granted. That issue, however, following careful consideration, was resolved against Rabinowitz by the Court of Appeals (see R. 226–227). The holding in this respect does not conflict with that of any other Court of Appeals. And since, as we shall show, the Court of Appeals was clearly correct on this point, there is no occasion for this Court to review this question. We accordingly submit that if the Court grants the Government's petition for certiorari, it should limit the issue to be reviewed to the single question presented therein, *i. e.*, the validity of the search and seizure.

The fact that the postage stamps involved in the two counts of the indictment were canceled stamps is plainly immaterial. Section 147 of the Criminal Code (18 U. S. C. [1940 ed.] 261), which defines the term "obligation or other security of the United States" as used in the two sections of the Code on which the counts of the

[3] This independent basis of attack on his conviction was urged by Rabinowitz in the Court of Appeals and is available to him as respondent on the Government's petition for certiorari, but only as to the second count. See *United States* v. *Ballard*, 322 U. S. 78, 88; *Nye & Nissen* v. *United States*, 336 U. S. 613, 616, 618–620.

indictment were based, specifically includes "canceled United States stamps" within the scope of that term.[4] Manifestly, therefore, the fact that the stamps in question were canceled stamps would not in itself suffice to place Rabinowitz'

[4] Section 147 provides: "The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national bank currency, * * * stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress, and canceled United States stamps."

The words "and canceled United States stamps" were added to this section of the Code by Section 3 of the Act of January 27, 1938, c. 10, 52 Stat. 7. As the cross petition points out, the words were added "as part of a general legislative plan to permit the illustration of canceled and uncanceled stamps in magazines and catalogues" (Cross Pet. 5). We find no warrant, however, either in the provisions of the 1938 Act or in its legislative history, for Rabinowitz' conclusion (Cross Pet. 5–6) that the *exclusive* purpose of Congress in adding "and canceled United States stamps" to the definitory language of Section 147 was to guard against frauds on the Government, as distinguished from frauds against the public in general and philatelists in particular. The whole purpose of the 1938 Act was to benefit philatelists. See S. Rep. No. 1159, 75th Cong., 1st sess. (p. 3), accompanying S. 2550 (which became the 1938 Act), where it is stated: "The bill (S. 2550) is designed to permit the legitimate illustration of United States and foreign postage stamps without seriously relaxing the laws against counterfeiting, and it is the opinion of your committee that this remedial legislation is most urgently needed and will prove of great benefit to the philatelists and philatelic journals throughout the country." It would be surprising if Congress, in view of its basic purpose to benefit philately in passing the 1938 Act, intended to *exclude* philatelists from the protection which Section 3 of the Act (amending the definitory language of § 147 of the Criminal Code) was designed to afford.

activities outside the scope of the types of conduct made criminal by Sections 151 and 154, which he was convicted of violating.

On the other hand, as pointed out by the Court of Appeals (R. 226), the inclusion of "canceled stamps" in the definitory section "is not of itself conclusive upon" the issue of whether Rabinowitz' activities violated Sections 151 and 154, since "it is possible so to alter cancelled stamps as to defraud the United States" [5]—whereas Rabinowitz' fraud was directed against stamp collectors. But, contrary to Rabinowitz' contention, the fact that his fraudulent scheme (see pp. 2–3, *supra*) had stamp collectors, rather than the Government, as its intended victims, is clearly irrelevant. Section 151 of the Criminal Code, on which count 2 was based, proscribes the possession or concealment of altered obligations of the United States "with intent to defraud" (see footnote 2, *supra*, p. 2). The plain meaning of this phrase is, "with intent to defraud" *anybody*.[6] Where Con-

[5] *United States* v. *Pappas*, 134 F. 2d 922 (C. A. 2). In that case, involving a prosecution under Section 154 of the Criminal Code (18 U. S. C. [1940 ed.] 268) for selling "false, forged, counterfeited, or altered obligation * * * of the United States," the articles sold were spurious postage stamps which had been produced by separating the clean from the marked portions of canceled stamps, and joining together the clean portions in such a way as to produce what appeared to be genuine uncanceled stamps.

[6] Compare the mail-fraud statute, Criminal Code, § 215 (18 U. S. C. [1946 ed.] 338), prohibiting the use of the mails pursuant to "any scheme or artifice to defraud."

gress has meant to limit the sense of a statute directed against frauds to frauds against the United States, it has said so in plain terms.[7] Section 148 of the Criminal Code (18 U. S. C. [1940 ed.] 262)—which is *in pari materia* with § § 151 and 154—similarly contains the phrase "with intent to defraud." It provides for the punishment of "Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States." As pointed out by the Court of Appeals (R. 227), Section 148 has twice been construed to apply to the forging or altering of government obligations with intent to defraud individuals, *Foster* v. *United States,* 76 F. 2d 183 (C. A. 10); *Errington* v. *Hudspeth,* 110 F. 2d 384 (C. A. 10), certiorari denied, 310 U. S. 638,[8] and there is no

[7] Compare the general conspiracy statute, Criminal Code, § 37 (18 U. S. C. [1946 ed.] 88), making it criminal to conspire "to defraud the United States."

[8] The *Foster* case involved a scheme to defraud one Billington by convincing him that through a chemical and rolling process the defendants could produce replicas of genuine currency, persuading him to furnish a large amount of money in varying denominations for this purpose, and then absconding. To convince Billington of their ability thus to duplicate genuine currency, the defendants altered certain figures on genuine $5 bills to make them accord with the figures on other genuine bills of the same denomination, and displayed the "originals" and "replicas" to their victim.

The *Errington* case involved a scheme to defraud stamp-collectors (as in the case at bar) by tinting genuine postage stamps a different color from the color in which they were issued, thereby creating fictitious philatelic values in the stamps.

tenable distinction between § 148 and either § 151 or § 154 in this regard.

"Moreover," as the Court of Appeals further observed (R. 227), "as a new question, there is good reason to suppose that Congress wished to prevent citizens from being imposed upon by forged currency or forged stamps, even though the wrongdoer did not intend a fraud on the Treasury. In the first place, however limited the forger's purpose, it does not follow that the instrument might not later be used to the detriment of the United States. That is obvious in the case of money, and the statute does not distinguish between the specific intent necessary in the case of money and that necessary in the case of stamps. Besides, quite aside from what may in addition have been a general desire to prevent people from being defrauded by these means, Congress may well have regarded it as important that the reputation of its issue should not be impaired by the infiltration of counterfeits."

We think it clear from the foregoing considerations, therefore, that the counterfeiting statutes in general, and §§ 151 and 154 of the Criminal Code in particular, were designed not only to prevent frauds on the Government as such, but also to prevent "obligations or other securities of the United States" (which, by statutory definition, as we have seen, include canceled postage stamps) from becoming instruments whereby the unscrupulous may defraud the unwary.

For the reasons stated, it is submitted that respondent's cross petition for certiorari should be denied as untimely, and that if the Government's petition for certiorari be granted the writ should be limited to the single issue presented therein, *viz,* the legality of the search and seizure.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1949.

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